TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~569.~~ 310

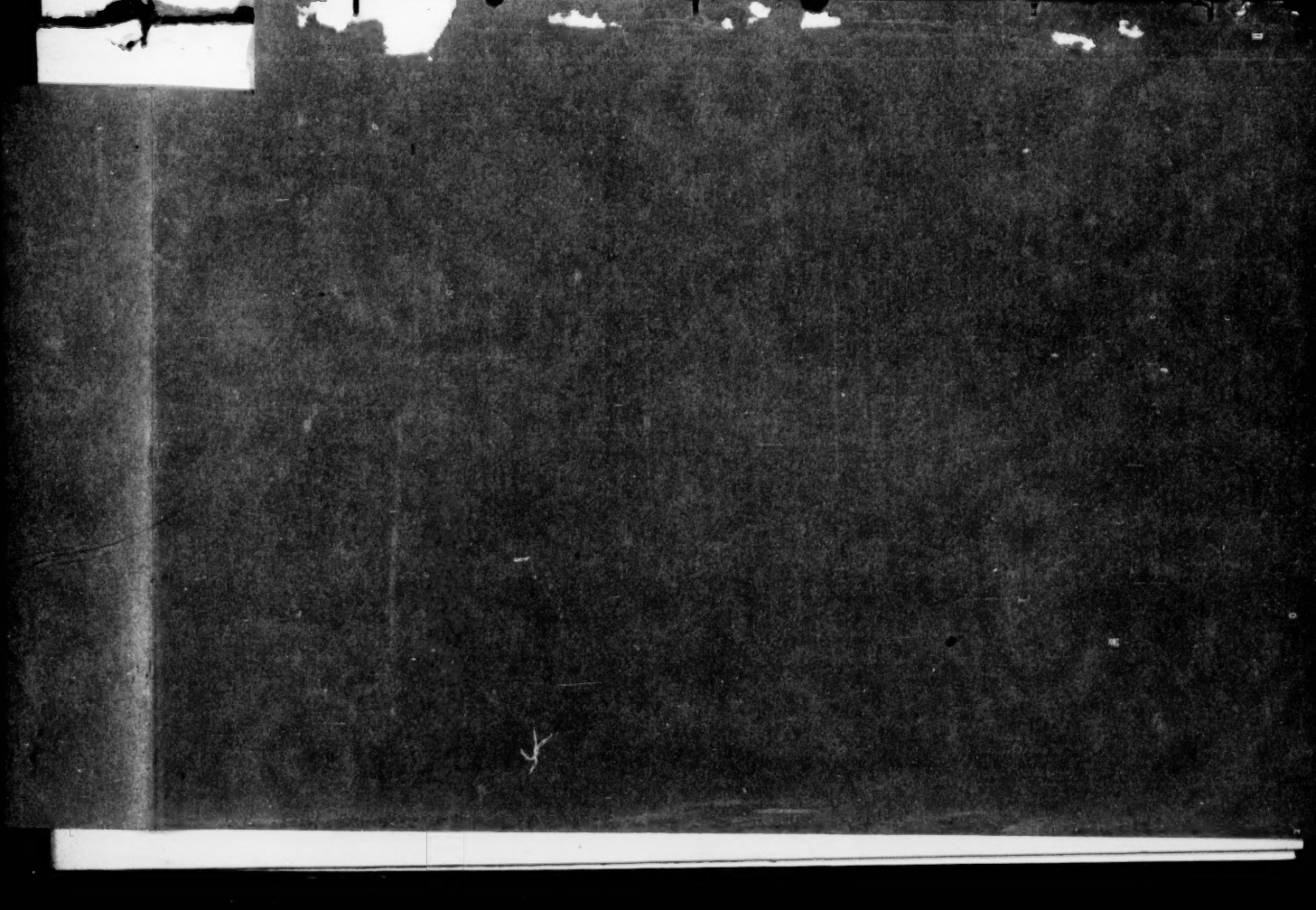
JEFFERSON TACEY, PLAINTIFF IN ERROR,

vs.

MARY IRWIN, NANNIE P. IRWIN, RUTH IRWIN, GRACE IRWIN, REBECCA IRWIN, AND EDITH QUISENBERRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED DECEMBER 28, 1871.



SUPREME COURT OF THE UNITED STATES.

No. 569.

JEFFERSON TACEY, PLAINTIFF IN ERROR,

vs.

MARY IRWIN, NANNIE P. IRWIN, RUTH IRWIN, GRACE IRWIN, REBECCA IRWIN, AND EDITH QUISENBERRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
Style of suit	1	1
Petition for certiorari	1	1
Writ of certiorari	5	2
Record of circuit court of Alexandria County filed	6	2
Commencement of record	6	3
Pleas	6	3
Title	6	3
Declaration	7	3
Notice	8	3
Proof of service	8	4
Conditional judgment	8	4
Judgment by default	9	4
Rule to plead	9	4
Return	10	5
Jefferson Tacey substituted as defendant	10	5
Plea "Not guilty"	11	5
Petition for removal to United States court	11	5
Certiorari produced	13	6
Cause ordered to be certified	14	6
Clerk's certificate	14	6
Judge's certificate	14	6
Certificate of sale	15	7
Clerk's certificate	17	8
Certificate of presiding justice	17	8
End of record	17	8
Proceedings in United States court commence	17	8
Suit revived	18	8
Stipulations	18	8

	Original.	Print.
Deposition of O. C. Whittlesey	18	8
Deposition of John Hawxhurst	27	11
Finding of the court	31	13
Judgment	36	15
Amendment proposed by defendant	37	15
Writ of error	40	16
Bond	42	16
Citation	43	17
Return	44	17
Clerk's certificate	45	17

1 *Style of suit.*

In the circuit court of the United States for the eastern district of Virginia, at Richmond, in said district, the 23d day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the 96th.

Be it remembered that heretofore, to wit, on the 10th day of August, 1868, came the defendant, by his attorney, and filed a petition, praying that a writ of certiorari may be awarded him, to the judge of the circuit court for the county of Alexandria, in the State of Virginia, directed, requiring him to remove to this court the case of Mary J. Dixon vs. Jefferson Tacey, for further proceedings to be had therein; which petition is in the words and figures following, to wit:

Petition for certiorari.

To the United States circuit court for the district of Virginia:

The petition of Jefferson Tacey respectfully showeth: That, on or about the fourth day of January, 1868, a suit was commenced in the circuit court of Alexandria County, in the State of Virginia, in ejectment, by Mary J. Dickson against W. E. Munsey, for the possession of premises situated in said county, being the premises known as No. 171 King st., in the city of Alexandria.

2

That, at the May term of said court, in 1868, it appearing that said W. E. Munsey was a tenant of your petitioner, on motion of your petitioner he was substituted as defendant in the said suit, and, on being so substituted, plead to issue therein, & the case was then continued to the next term of the court, & is still pending and undetermined, under the name and style of Mary J. Dickson v. Jefferson Tacey.

Your petitioner further sheweth that, on or before the first day of November, 1864, there became due, under the revenue laws of the United States, in respect to the premises described in declaration in said suit, to the United States, certain sums of money for direct taxes, which had before that time been legally assessed thereon, & with the payment whereof the said premises had become charged in law; that said taxes being unpaid, & the said premises having become forfeited to the United States, in the month of January, 1864, in accordance with an act of Congress passed on or about the 7th day of August, 1862, entitled "An act for the collection of taxes in insurrectionary districts within the United States, & for other purposes," & amendments thereto, the said premises were duly advertised for sale at public auction,

3

& upon such sale your petitioner, being the highest bidder, became the purchaser thereof, & a certificate of sale was, in accordance with said act, issued to your petitioner by the tax commissioners appointed under said act.

That your petitioner took possession of the said premises, claiming a right so to do by virtue of authority given by said certificate of sale, issued to him under authority of the act of Congress aforesaid, & has since so held possession & now so holds possession, & this is the defence he has, & intends to insist & rely upon on the trial of this cause, & he claims a right to the possession of said premises, & that he had a right to take possession by virtue of & under color of authority of the act of Congress aforesaid & amendments thereto.

Your petitioner therefore respectfully petitions that the said action may be removed from said State court to this court, & that process for

that purpose may issue in accordance with the statute in such case made & provided, & for such other relief as may be just & equitable, and your petitioner will ever pray, &c.

JEFFERSON TACEY.

4 STATE OF VIRGINIA,
County of Alexandria, to wit:

On this sixth day of August, 1868, before me, J. R. Johnston, a justice of the peace in & for said county, came Jefferson Tacey, who signed the above petition & made oath that the facts therein set forth are true, to his knowledge, except as to the matters stated upon information & belief, & as to those matters he believes them to be true.

JEFFERSON TACEY.

Given under my hand this 6th day of August, 1868.

J. R. JOHNSTON, *J. P.*

I, Westel Willoughby, an attorney & counsellor at law, of the supreme court of appeals of the State of Virginia, & also of the circuit court of the United States for the district of Virginia, certify, that as counsellor for the petitioner named in the above petition, I have examined the proceedings against him, referred to in said petition, & have carefully inquired into all the matters set forth in the petition, & believe the same to be true.

WESTEL WILLOUGHBY.

5 Thereupon the following certiorari was issued, as prayed for in the foregoing petition:

Certiorari.

The President of the United States of America to the judges of the circuit court of Alexandria County, of the State of Virginia, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the district of Virginia, in the fourth circuit, shall be certified of a certain cause commenced before you, against Jefferson Tacey, defendant, by Mary J. Dixon, plaintiff, do, therefore, command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of Richmond, on the fourth Monday of November, 1868, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said circuit court may cause to be further done thereupon what of right ought to be done.

Witness Salmon P. Chase, esquire, Chief Justice of the Supreme Court of the United States, the tenth day of August, in the year one thousand eight hundred and sixty-eight.

[SEAL.] W. H. BARRY, *Clerk.*

Record filed.

And at another day, to wit, on the 23d day of November, 1868, the defendant filed the record of the said circuit court of Alexandria County, which said record is in the words and figures following, to wit:

RECORD OF CIRCUIT COURT OF ALEXANDRIA COUNTY.

VIRGINIA.

MARY J. DIXON
vs.
JEFFERSON TACEY. } In ejectment.

Pleas.

Pleas at the court-house in the city of Alexandria, before the judge of the circuit court for the County of Alexandria, on Saturday, the 22d day of August, in the year 1868.

Title.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of the said circuit court for Alexandria County, on Monday, the 6th day of January, 1868, came Mary J. Dixon, by S. Ferguson Beach, her attorney, and filed her declaration against William E. Munsey of a plea of ejectment, which declaration, together with the notice, affidavit, and return thereon endorsed, are in the words and figures follow-
7 ing, to wit:

Declaration.

In the circuit court of Alexandria County, Va., Alexandria County, to wit:

Mary J. Dixon complains of W. E. Munsey for this: For that heretofore, to wit, on the 1st day of January, 1865, the said plaintiff was possessed of a certain tenement and lot of ground in the city of Alexandria, in said county, situated on the north side of King street, between Washington and Columbus streets, being the premises known as 171 King street; beginning at a point 48 feet west of Washington street, and running thence west on King street 23 feet 8½ inches, and extending back from King street feet, being the same property which was conveyed to Turner Dixon by John Withers, by deed bearing date March 8th, 1850, recorded in book L, No. 3, page 225, of the Alexandria County land records; which said premises the plaintiff claims in fee, and the plaintiff being so possessed, the said W. E. Munsey afterwards, to wit, on the day of , 1865, entered into the said premises and ejected the said plaintiff therefrom, and unjustly withholds from the said plaintiff the possession thereof, to the damage of the plaintiff $2,000, and therefore she brings suit, &c.

BEACH, *J. P.*

8 *Notice.*

To W. E. MUNSEY:

Please to take notice that on the first Monday of January, 1868, I shall file in the clerk's office of the Alexandria circuit court a declaration in ejectment, of which the within is a copy.

MARY J. DIXON,
By S. FERGUSON BEACH,
Her Att'y.

Proof of service.

ALEXANDRIA COUNTY, VIRGINIA, *to wit:*

Tho's J. Edelin this day makes oath before me, Samuel Beach, a justice of the said county, than he delivered to W. E. Munsey a copy of the within declaration, and of the notice attached, on the 4 day of January, 1868.

Given under my hand this 6th day of January, 1868.

SAM'L PEACH, *J. P.*

Return.

Executed by serving a copy of the within on W. E. Munsey at his reridence.

December the 4th, 1868.

T. J. EDELIN, *A. C. C.*

Conditional judgment.

And, it appearing by the affidavit of Tho's J. Edelin that William E. Munsey, the tenant in possession of the premises, hath been duly served with a copy of the said declaration, and the notice there-
9 under written, and he not appearing, although solemnly called, it is ordered that, unless he or those under whom he claims, having legal notice of this order, do appear here at the next rules, and plead to general issue in the declaration supposed, judgment shall be given for the plaintiff, and a writ of habere facias possessionem awarded her.

And at another day, to wit, at rules held in the clerk's office of the circuit court aforesaid, on Monday, the 3d day of February, 1868:

Judgment by default.

This day came the plaintiff, by her attorney, and it appearing that William E. Munsey, who is in possession of the premises in the declaration mentioned, had been duly served with a copy of the rule issued against him, requiring him to appear at the then next rules and plead to the plaintiff's declaration, and he not appearing, although solemnly called, it is considered that the plaintiff recover against the defendant the said premises, with the appurtenances; which rule, together with the return thereon endorsed, *are* in the words and figures following, to wit:

Rule to plead.

The Commonwealth of Virginia to the sheriff of Alexandria County, greeting:

We command you to summon W. E. Munsey, if he be found
10 within your bailiwick, to appear at the clerk's office of our circuit court for our said county of Alexandria, at the rules to be holden for said court on the fourth Monday in January, 1868, and plead to a declaration in ejectment this day filed in said office, with proof of the service of the notice thereof, by Mary J. Dixon. And have then there this writ.

Witness, Jefferson Tacey, clerk of our said court, at the court-house of said county, the 6th day of January, 1868, and in the 92d year of the Commonwealth.

J. TACEY.

Return.

Return. Executed by delivering a copy to W. E. Munsey, January 27th, 1868, 1868.

GEO. W. ROCK, *D. S., for*
J. M. STEWART, *Sheriff.*

Jefferson Tacey substituted as defendant.

And at another day, to wit, at a circuit court continued and held for Alexandria County, at the court-house of said county, on Thursday the 6th day of February, 1868, this day came the plaintiff, by her attorney, and Jefferson Tacey came also by attorney, and moved the court to be substituted as defendant in this suit, in the stead of W'm E. Munsey, which motion is sustained by the court.

11 *Not guilty.*

Thereupon the said Jefferson Tacey pleaded not guilty, and thereupon put himself upon the country, and the plaintiff does the like, and this cause is continued to the next term of this court.

And at another day, to wit, at a circuit court continued and held for said county of Alexandria, at the court-house aforesaid, on Saturday, the 23d day of May, 1868: this day came the parties, by their attorneys, and the defendant filed his petition for the removal of this cause to the circuit court of the United States for the district of Virginia, which petition is in the words and figures following, to wit:

Petition for the removal to U. S. circ't court.

In the circuit court of Alexandria County.

MARY J. DIXON
vs.
JEFFERSON TACEY. } In ejectment.

The petition of Jefferson Tacey, the defendant in the above-entitled action, respectfully showeth—

That on or before the first day of November, 1864, there became due, in respect of the premises described in the declaration of the plaintiff in this suit, to the United States, certain sums of money for direct taxes, which had before that time been legally assessed thereon, and with the payment whereof the said premises had become charged in law,
12 that said taxes being unpaid, and the premises having become forfeited to the United States in the month of January, 1864, in accordance with an act of Congress passed on or about the 7th day of August, 1862, entitled "An act for the collection of taxes in insurrectionary districts within the United States, and for other purposes," and amendments thereto, were duly advertised for sale, at public auction, and upon such sale the said defendant, being the highest bidder, became the purchaser thereof, and a certificate of sale was, in accordance with said act, issued to your petitioner by the tax commissioners appointed under said act; that your petitioner took possession of the said premises, claiming a right to do so by virtue of authority given by said certificate of sale, given under authority of the act of Congress aforesaid,

and has since so held possession, and now holds possession, and this is the defense he has and intends to insist upon on the trial of this cause, and he claims a right to the possession of said premises, and that he had a right to take possession by virtue of and under color of authority of the act of Congress aforesaid.

The petitioner therefore prays that this action may be removed
13 for trial to the circuit court of the United States for the district of Virginia, pursuant to the act of Congress approved March 3d, 1863, entitled an act relating to habeas corpus and regulating judicial proceedings in certain cases, and the acts amendatory thereto, and your petitioner will ever pray, &c.

JEFFERSON TACEY.

Subscribed and sworn to before me this 23d day of May, 1868, in the county of Alexandria, Virginia.

FRANCIS L. SMITH, JR.,
Not. Pub.

Certiorari produced.

And now, at this day, to wit, at a circuit court continued and held for Alexandria County, at the court-house of said county, on the same day and year first herein mentioned, to wit, on Saturday, the 22d day of August, 1868, the defendant, by his attorney, produced a writ of certiorari, commanding the judge of this court to send and certify the record and proceedings in this suit, with all things touching the same, to the judge of the circuit court of the United States for the district of Virginia, on the fourth Monday in November, 1868; which writ is in the words and figures following, to wit:

(See certiorari heretofore inserted.)

14 *Cause ordered to be certified.*

Whereupon it is ordered that the same be certified accordingly.

Clerk's certificate.

STATE OF VIRGINIA,
Alexandria County, to wit:

I, Jefferson Tacey, clerk of the circuit court for the said county of Alexandria, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain action of ejectment, lately depending in the said circuit court between Mary J. Dixon, plaintiff, and Jefferson Tacey, defendant, with all things touching the same, as fully and wholly as they now exist in the records of my office.

In testimony whereof I hereto set my hand and the seal of the said court this 9th day of November, A. D. 1868.

[SEAL.] J. TACEY.

Judge's certificate.

VIRGINIA, *Fairfax County, to wit:*

I, Henry W. Thomas, only judge of the circuit court for the
15 county of Alexandria, in the State of Virginia, do certify that Jefferson Tacey, who hath given the preceding certificate, was, at

the time of his giving said certificate, clerk of the said court; and that his attestation is in due form.

Given under my hand this 9th day of November, A. D. 1868.

HENRY W. THOMAS.

The following is a copy of the certificate of sale given by the United States, through their duly authorized direct tax commissioners, to Jefferson Tacey, the defendant in the foregoing action in ejectment, as purchaser of the premises in said suit mentioned, to wit:

Certificate of sale.

No. 111.

UNITED STATES OF AMERICA.

Tax-sale certificate, No. 33.

This is to certify that, at a sale of lands for unpaid taxes, under and by virtue of an act, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," held pursuant to notice at Alexandria, in the county of Alexandria, in the State of Virginia, on the 29th day of January, A. D. 1864, the tract or parcel of land hereinafter described, situate
16 in the city and county of Alexandria, and State *of* aforesaid, and described as follows, to wit: House on King street, between Washington and Columbus, said to have belonged to Turner Dixon, and charged to him on the land-book of the State aforesaid for the year 1860; and further described as being No. 171 King street (lot fronting on King about 23 feet, and running 52 feet to a 3-feet alley, be the same more or less) was sold and struck off to Jeff. Tacey for the sum of two thousand five hundred & seventy-five dollars and cents, he being the highest bidder, and that being the highest sum bidden for the same, the receipt of which said sum, in full, is hereby acknowledged and confessed.

Given under our hands, at Alexandria, this 29th day of January, A. D. 1864.

JOHN HAWXHURST,
GILLET F. WATSON,
A. LAWRENCE FOSTER,
Commissioners.

STATE OF VIRGINIA.

ALEXANDRIA COUNTY COURT, CLERK'S OFFICE,
8 *a. m., July* 21, 1864.

The above certificate of sale was this day received in the office, and admitted to record.

Teste: JEFFERSON TACEY, *Clerk.*

17 *Clerk's certificate.*

STATE OF VIRGINIA,
Alexandria County, to wit:

I, Jefferson Tacey, clerk of the county court for the said county of Alexandria, in the State of Virginia, do hereby certify that the foregoing is a true transcript from the records of the said court.

In testimony whereof I hereto set my hand and annex the seal of the said court this 18th day of November, A. D. 1868.

[SEAL.] J. TACEY.

[5-c. int. rev. st'p.]

Certificate of presiding justice.

VIRGINIA, *Alexandria County, to wit:*

I, Lewis McKenzie, presiding justice of the county court for the said county of Alexandria, in the State of Virginia, do certify that Jefferson Tacey, who hath given the preceding certificate, is clerk of the said court, and that his said attestation is in due form.

Given under my hand this 18th day of November, A. D. 1868.

LEWIS McKENZIE.

(End of record.)

Proceedings in U. S. court.—Suit revived.

And at another day, to wit, on the 24th day of January, 1870,
18 at a circuit court of the United States for the district of Virginia, at Richmond, in said district, it being suggested to the court that the plaintiff in this suit is dead, by consent it is ordered that this case be revived, and hereafter stand in the name of Mary Irwin, Ann P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, and Edith Quisenberry as plaintiffs.

Stipulations filed.

And at another day, to wit, on the 25th day of January, 1870, came the parties, by their attorneys, and filed the following stipulation, to wit:

Stipulations.

It is hereby stipulated and agreed that the issue in this cause may be tried and determined by the court without the intervention of a jury, the parties, by their attorneys, hereby waiving a jury.

S. FERGUSON BEACH,
Att'y for Plaintiff.
W. WILLOUGHBY,
Att'y for Defendant.

The following depositions are filed in this cause, to be read as evidence for the plaintiff:

Deposition of O. C. Whittlesey.

In the United States circuit court for Virginia.

DIXON *vs.* TACEY. } Ejectment.

19 The deposition of O. C. Whittlesey, taken on the 4th day of August, 1870, at Alexandria, Va., before Robert Bell, a justice of said city, to be read for the plaintiff upon the trial of the above-named cause.

Present: S. Ferguson Beach, attorney for plaintiff;
" J. Tacey, defendant, in person; and
" W. Willoughby, his attorney.

OSCAR C. WHITTLESEY, being duly sworn, deposeth and saith:

Question 1. State your age, place of residence, and profession.

Answer. I was born in 1826; nearly 44 years of age; residence, Alexandria; attorney at law by profession.

Question 2. How long have you lived in Alexandria?

Answer. About 22 years.

Question 3. Were you ever acquainted with Turner Dixon, of Alexandria? Is he living or dead? If dead, how long has he been dead?

Answer. I was acquainted with Mr. Dixon. I understand he is dead. I do not know how long since he died. I believe he died during the war.

Question 4. Did Turner Dixon reside in Alexandria at the time of the breaking out of the rebellion in 1861? And, if so, whereabouts in said city?

20 Answer. I am not sure, but think he went away before the war commenced. He left, I think, a short time before the war commenced. He lived up to that time in Alexandria, and resided in the property which is the subject of controversy in this suit.

Question 5. Was Mr. Dixon in Alexandria during the rebellion? If not, where was he reputed to be—on which side of the belligerent lines?

Answer. He was not here, I believe, during the rebellion. He was reputed to be on the confederate side of the lines.

Question 6. Were you residing uninterruptedly in Alexandria throughout the rebellion, particularly during 1863 and 1864?

Answer. I was.

Question 7. Were you acquainted with Messrs. Hawxhurst & others U. S. direct tax commissioners for Virginia? Had they an office in Alexandria, and did you frequently or occasionally visit said office on business with the said commissioners?

Answer. I was acquainted with them. They had an office in Alexandria, and at one time I occupied the office with them. I was often in said office.

Question 8. State whether, on any occasion when you were at said office, you heard conversation by any one with the commissioners

21 in relation to the payment of the tax on Turner Dixon's property. If yea, state the conversation, who held it, when it occurred, and all you can remember touching it.

Answer. The conversation was between Mr. W. P. Quisenberry and Mr. Hawxhurst principally; Mr. Foster, I think, was present—I am not sure about Mr. Watson. From what I heard I gathered that he was there for the purpose of paying Turner Dixon's taxes. He stated that the parties were outside the lines, and could not appear in person; and that he appeared there for them. Mr. Hawxhurst refused to receive the tax from Mr. Quisenberry; and Mr. Q. remarked to me that he thought it was a damned hard case. That is about all I know.

Question 9. Who was Mr. Quisenberry? Was he connected in any way with Mr. Dixon; and what, if you know, were the personal relations subsisting between them?

Answer. I understand that they were related to each other, but in what way I do not know. Mrs. Dixon calls Mr. Quisenberry's daughter her niece. I believe Mr. Dixon and Mr. Quisenberry were intimate friends.

Question 10. Was Mr. Quisenberry a man of means?

Answer. He was reputed to be wealthy.

Question 11. Is Mr. Quisenberry now living, or dead?

22 Answer. I believe he is dead. I think he has been dead several years.

Cross-examination:

Question 1. Was the interview you speak of a lengthy one?

Answer. Not very. They were in there when I went, and I suppose the conversation lasted five or ten minutes after I went in.

Question 2. Did Mr. Q. manifest considerable feeling about it?

Answer. Considerable. It made him swear some.

Question 3. Was he not considerably violent about it?

Answer. He did not seem very boisterous.

Question 4. Do you think Mr. Foster was present at this interview?

Answer. I think he was.

Question 5. Did he take any part in the conversation?

Answer. Mr. Hawxhurst was the principal speaker. I am not sure that Mr. Foster did, but I presume so.

Question 6. State who else was present.

Answer. I think Mr. Brady was. I think there were several persons present at the time. I think Mr. W'm H. Marbury was one.

23 Re-examination:

Question 1. Have you since had any reason to believe your recollection was at fault in respect to Mr. Marbury's being there?

Answer. Yes, from the fact that I called on Mr. Marbury, and he stated that he did not remember being present on that occasion, and did not suppose he was.

Question 2. Was there any particular circumstance occurring at the time, to fix upon your memory the fact of the presence or absence of Mr. Foster; and can you now swear positively, speaking from your recollection, that Mr. Foster actually was there?

Answer. No; I do not believe I can. I believe he was, as far as my memory serves me; but I cannot fix on any circumstance now.

Question 3. Can you speak with any greater certainty respecting Mr. Foster's presence than you can respecting Mr. Watson's?

Answer. I don't believe I can.

Question 4. You say you think Mr. Foster was there. What makes you think so?

Answer. I think so, because I see him prominently in my memory, but would not swear that he was there. I have no doubt of it in my own mind, but yet cannot fix upon any circumstance.

24 Question 5. Were you very often at the office on other occasions, and was Mr. Foster generally there on such occasions?

Answer. Yes; I was often there, and Mr. Foster was generally present.

Question 6. Do you know whether this property was sold by the commissioners for the non-payment of the tax?

Answer. I believe it was, but I was not present at the sale.

Question 7. Was the conversation you speak of before or after the sale of the property by the commissioners?

Answer. It was before the sale.

Question 8. How do you know it was before the sale? What enables you to determine that it was before the sale?

Answer. I know it was before the sale, for I think it was on this occasion I went to see the list of property advertised, on behalf of a colored man whose property had been advertised by mistake.

Question 9. Had there been any sale by the commissioners, as well as you recollect, before your visit to the office when the conversation occurred?

Answer. I feel positive there had been no sales.

25 Cross-examination resumed.

Question 1. You say the reason you think this was before the sale is because you went to examine the list on behalf of a colored man. Is that the only reason you think it was before the sale?

Answer. I think it was the occasion on which I went about the colored man's property. This is one reason why I think it was before the sale. Another is, because I don't think Mr. Quisenberry would have been there if it was after the sale. These are all the reasons which induce me to think so.

Question 2. Can you state the date of this conversation?

Answer. I cannot. I think it was some time in 1863. I cannot say whether it was in the winter or fall.

Question 3. Were there not several sales of property, for non-payment of taxes, in the city?

Answer. I believe there was more than one.

Question 4. May not this conversation have been in the spring?

Answer. I cannot say positively, because I do not remember when it was. It was in cool weather, as there was a fire in the stove.

Question 5. Would you say positively that the occasion of this
26 conversation was that of your going to see the list for this colored man?

Answer. I cannot state positively, but that is my impression.

Re-examination resumed.

Question 1. Was anything said, in this conversation, about the property having been sold? Or was anything said about its redemption?

Answer. No.

Question 2. Do you think you would remember if anything had been said on the subject?

Answer. Yes.

And further this deponent saith not.

O. C. WHITTLESEY.

CITY OF ALEXANDRIA, VIRGINIA:

I, Robert Bell, a justice of the peace in and for said city, do certify that the foregoing deposition was taken, subscribed, and sworn to before me, as set forth in the caption.

Given under my hand this 4th day of August, 1870.

ROBERT BELL, *J. P.*

Fee, $2; paid by S. F. Beach.—R. B., J. P.

27 *Deposition of John Hawxhurst.*

In the United States circuit court for Virginia.

DIXON *vs.* TACEY. } Ejectment.

The deposition of John Hawxhurst, taken on the 4th day of January, 1871, at Alexandria, Va., before Robert Bell, a justice of said city, to be read for the plaintiff upon the trial of the above-named cause.

Present, S. Ferguson Beach, attorney for plaintiff;
" Jefferson Tacey, defendant, in person; and
" W. Willoughby, attorney.

JNO. HAWXHURST, having duly affirmed, deposed as follows:

Question 1. You were one of the tax commissioners for the State of Virginia?

Answer. I was one of the United States direct tax commissioners for the State of Virginia. I know the property in question was sold by the tax commissioners, and that Jeff. Tacey was the purchaser. I do not know that any offer was made to pay the tax on this property before it was sold. I have no recollections on that subject. There may, or there may not have been, such an offer made, but I have no recollection of it. I recollect Mr. Quisenberry being in the office about
28 paying the tax on some property; do not recollect what property it was. I do not recollect whether it was before or after the forfeiture, but my impression is that it was before the sale. I thought Mr. Quisenberry was peculiar in his manner, or that he was under the influence of liquor. That peculiarity brings to my mind the fact that he was in the office. It is my impression that he was there more than once. I recollect that he was there, offering to pay taxes, but do not recollect the particular property on which he proposed to pay. I have no recollection on the subject, except that he was there before the proceedings had gone very far.

Question 2. What principle, or what considerations, governed the commissioners in advertising property for sale after the expiration of the sixty days provided by law for the payment of the tax? Did they advertise all indiscriminately, or was there any discrimination shown?

Answer. The first list, of about fifty pieces of property, was selected from the general list of property, belonging to those persons who were supposed to be most offensive to the United States Government.

Question 3. Why did you make an earlier advertisement of these than of the other delinquent property?

29 Answer. The commissioners did not treat the property in Alexandria as forfeited until after it was advertised; and it was thought that by advertising a small list it would induce others to come forward and pay the taxes on property not advertised. It had that effect, and reduced our list more than one-half.

Question 4. In selecting the first list for advertisement why did you select property belonging to those deemed most offensive to the United States?

Answer. Because if any hardships arose from the execution of the laws, we thought it better they should fall on those. In making the first list no particular pains were taken in making the selection.

Cross-examination:

Question 1. How many pieces of property were sold as belonging to Mr. Dixon?

Answer. Two.

Question 2. Was it not a common occurrence for parties to ask you, both in and out of the office, whether you would receive payment of the taxes from any one except the owner in person, without any special offer to pay on their part?

Answer. It was a common occurrence.

30 Question 3. Could you say Quisenberry did any more than this?

Answer. He possibly might not, but I think that he did.

Question 4. Have or had you any knowledge of his being prepared to pay the taxes?

Answer. I have not, nor had I any such knowledge, but was informed by Mr. B. W. Hunter that he was a man of means. Mr. Hunter was a sworn clerk in our office.

Question 5. Have you any recollection of his offering any money in payment of these taxes?

Answer. I have not. I mean by this answer to say that he did not show me any money or state that he had any.

Question 6. Have you any recollection of Mr. O. C. Whittlesey being present, or any persons, at an interview with Mr. Quisenberry?

Answer. O. C. Whittlesey was frequently in the office, but do not recollect whether he was present when Mr. Quisenberry was in the office. I recollect Mess. B. W. Hunter and Mr. Beady were present. They were clerks in the office.

Re-examination:

31 Question 1. If Mr. Quisenberry had shown any money, or had stated that he had it, would that have made any difference in the action of the commissioners?

Answer. It would not.

And further deponent saith not.

JNO. HAWXHURST.

CITY OF ALEXANDRIA, VIRGINIA, *to wit:*

I, Robert Bell, a justice of the peace in and for said city, do certify that the foregoing deposition was taken, subscribed, and affirmed to before me, as set forth in the caption.

Given under my hand this 4th day of January, 1871.

ROB'T BELL, *J. P.*

Fees $1.50, paid by S. E. Beach. R. B., J. P.

Finding of the court.

And now at this day, to wit, on Thursday, November 23d, 1871, the issues of fact in this cause having been tried and determined by the court without the intervention of a jury, pursuant to stipulation in writing, duly signed and filed, the court doth make the following

32 finding upon the facts:

Prior to and at the time of the sale by the United States direct tax commissioners hereinafter mentioned, Turner Dixon, of the city of Alexandria, Va., was seised and possessed in fee of the premises in the declaration mentioned.

On the day of , 1864, Turner Dixon died, having first published a valid will and testament, by which he devised the said premises to the said Mary J. Dixon.

On the day of , 1871, said Mary J. Dixon died, having first published a valid will and testament, by which she devised the said premises to Mary Irwin & the others in whose names, as plaintiffs, this cause stands revived.

On the 29th day of January, 1864, the said premises were sold by the United States direct tax commissioners for Virginia, appointed under the act of Congress, approved June 7, 1862, entitled "An act for the collection of the direct tax in insurrectionary districts within the United States, and for other purposes."

33 The said property was sold by said commissioners as land liable to be sold under the provisions of the 7th section of said act, because the direct tax imposed upon said property by the act of Aug. 5, 1861, imposing a direct tax, had not been paid.

The property was purchased at said sale by J. Tacey, the defendant, who received from said commissioners a certificate of sale, in the words and figures following:

(See certificate heretofore inserted.)

Under and by virtue of said certificate of sale, the said defendant entered upon and now holds the said property.

The said tax commissioners entered upon the discharge of their duties in the city and county of Alexandria, Va., in the month of June, 1863, and on the 14th day of September, 1863, they fixed the amount of the said direct tax chargeable respectively upon the several lots and parcels of ground in said city and county, including the property in controversy in this cause.

On the 11th of September, 1863, they caused to be inserted in a newspaper published daily in Alexandria, Va., the following notice:

34 *Notice to owners of real estate.*

The undersigned commissioners hereby give notice that they will be ready at their office, corner of Washington and Prince streets, Alexandria, on and after the 14th of September next, to receive the direct tax assessed and fixed by them on the lots and tracts of land in the city and county of Alexandria, under and by virtue of an act of Congress entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes."

Office hours from 8¾ o'clock a. m. to 2¾ p. m.

JOHN HAWXHURST,
W. J. BOREMAN,
G. F. WATSON,
Commissioners.

The said commissioners, in performing their duties under the said act of June 7, 1862, did not, at any time or in any case, make or cause to be made any demand for the payment of the tax, either upon the owner or occupant of the property respectively liable therefor, or upon any person whatever, and they made no effort in any case, of any kind whatever, to collect said tax, before proceeding to a sale of the land,

35 except the publication of the said notice of Sept. 11th.

On the expiration of sixty days from the 14th of September, 1863, the said commissioners treated all of said property in said city and county on which the tax then remained unpaid, as forfeited to the United States, and liable to sale under said 7th section of said act of June 7, 1862, and they proceeded, from time to time, to advertise the same for sale accordingly.

Pending the advertisement of property for sale under said 7th section, said commissioners, pursuant to a general rule adopted by them to that effect, invariably refused, in all cases, to receive the tax upon property so advertised, unless tendered by the owner in his own proper person, and notwithstanding the tender of the tax by any agent, relative, or friend of the owner, the commissioners, nevertheless, treated and sold the property as delinquent.

This rule and practice was established and followed by them, pursuant to instructions from some officer of the Treasury Department.

Applications were made to said commissioners by the agents and friends of absent owners to pay the tax upon advertised property
36 and save it from sale; which applications, under the operation of said rule and practice, were uniformly refused by the commissioners.

No note, record, or memorandum of such applications was kept or made by the commissioners, though such applications were frequent.

The premises in the declaration mentioned were sold as aforesaid by the commissioners without the knowledge or consent of the said Dixon, he being absent from Alexandria and within the confederate military lines, from the day , 1861, continuously to the day of his death.

Whilst the said premises, however, were advertised for sale, his brother-in-law went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer or tender of payment, because such offer or tender was, in effect, waived by said commissioners, they declining to recognize any tender unless made by the owner in proper person.

Judgment.

Wherefore it is considered by the court that the plaintiffs do
37 recover of the defendant the premises in the declaration mentioned according to the finding of the court, and that they recover also their costs by them about their suit in this behalf expended.

HUGH L. BOND,
Judge, &c.

Nov. 23d, 1871.

Amendment proposed by def't.

To which finding and judgment the defendant, by counsel, proposed the following amendment:

Amendment.

This rule or practice was not, at any time, put in writing, nor was there any written memorandum thereof in any of the proceedings of said commissioners.

There was no official publication of any such rule, nor any application of it, except in those cases in which a tender was actually made by some person other than the owner, and no notice of any such rule or practice, except such as may have been mentioned by the several commissioners, as individuals, to persons who may have conversed with them upon the subject, or such notice as may have resulted from a knowledge that said commissioners had, in the cases where
38 application had been made by some person other than the owner, refused to receive the tax, except from the owner.

There was no application of such rule or practice in this case; it not appearing that any tender of the tax was made either by the owner, or by any person in his behalf.

A brother-in-law of the plaintiff, whilst the said premises were advertised for sale, went to the office of the commissioners, and in such a manner as one partially intoxicated, and appearing so to be *by* the com'r with whom he conversed, inquired of such com'r whether the tax on said premises would be received from him, to which inquiry the said

commissioner replied that it would not, and would *not* be received only from the owner in person.

The said brother-in-law did not produce any money, nor does it appear that he had any money to pay the tax, nor did he offer to pay the tax, nor does it appear that he was able or prepared to pay such tax, nor did he, at that time, or at any other time, make known to the commissioners that he was prepared to pay such tax.

W. WILLOUGHBY,
Att'y for Def't.

39 The def't, by his attorney, objects to the last eight lines of the finding prepared by the plaintiffs' attorney, and proposes the above in place thereof.

W. WILLOUGHBY,
Att'y for Def't.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Mary Irwin, Nannie P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, & Edith Quisenberry, plaintiffs, and Jefferson Tacey, defendant, a manifest error hath happened to the great damage of the said Jefferson Tacey, as by his complaint appears. We being willing that
41 error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the third Monday of December, 1871, next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and seventy-one.

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Allowed by—

JOHN C. UNDERWOOD,
Dis't Judge.

42 Know all men by these presents that we, Jefferson Tacey and Samuel N. Garwood, are held and firmly bound unto Mary Irwin, Nannie P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, and Edith Quisenberry, in the full and just sum of one thousand dollars to be paid to the said Mary Irwin, Nannie P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, and Edith Quisenberry, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this second day of December, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Virginia, in a suit depending in said court between Mary Irwin, Nannie P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, and Edith Quisenberry, plaintiffs, and the said Jefferson Tacey, defendant, a judgment was rendered against the said Jefferson Tacey; and the said Jefferson Tacey, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mary Irwin, Nannie P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, and Edith Quisenberry, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the third Monday of December next, 1871.

Now, the condition of the above obligation is such, that if the said Jefferson Tacey shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JEFFERSON TACEY. [L. S.]
SAMUEL N. GARWOOD. [L. S.]

Sealed and delivered in presence of—
JOHN S. FOWLER.
Approved by—

JOHN C. UNDERWOOD, *Dis't Judge.*

43 The United States of America to Mary Irwin, Nannie P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, and Edith Quisenberry, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the third Monday of December next, 1871, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein Jefferson Tacey is plaintiff in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this second day of December, in the year of our Lord one thousand eight hundred and seventy-one.

JOHN C. UNDERWOOD,
Judge of the Circuit Court of the United States for the Eastern District of Virginia.

45 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify that the foregoing contains a true and perfect transcript of the record, process, and proceedings in a cause determined in said court, wherein Jefferson Tacey is plaintiff in error and Mary Irwin, Nannie P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, and Edith Quisenberry are defendants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 7th day of December, in the year of our Lord one thousand eight hundred and seventy-one, and in the year of our Independence the 96th.

[SEAL.] M. F. PLEASANTS, *Clerk.*

(Indorsement on cover:) No. 569. Jefferson Tacey, plaintiff in error, vs. Mary Irwin, Nannie P. Irwin, Ruth Irwin, Grace Irwin, Rebecca Irwin, & Edith Quisenberry. E. Virginia C. C. U. S. Filed 28th December, 1871.

SUPREME COURT OF THE UNITED STATES.

JEFFERSON TACEY, PLFF. IN ERROR,
vs.
MARY IRWIN, et. al. DEFTS. IN ERROR.

No. 110.

Points of Plaintiff in Error.

Supreme Court of the United States.

———o———

JEFFERSON TACEY, PLFF. IN ERROR,
vs.
MARY IRWIN, et. al. DEFTS. IN ERROR.
} *Points of Plff. in Error.*

I.

This case comes before the court upon a writ of error directed to the Circuit Court of the United States for the Eastern District of Virginia.

The action was originally brought by the defendants in error against the plaintiff in error in the Circuit Court of Alexandria, Va., in ejectment to recover a house and lot which he had purchased at a tax sale under the act of June 7th, 1862, providing for the collection of taxes in Insurrectionary Districts. The case was removed to the United States Court by writ of certiorari under the act of 1833, providing for the removal of revenue causes. The case was tried before the court without a jury under a stipulation filed, and thereupon the court made a finding of facts in substance as follows: That the party represented by the defendents in error were seized of the property; that default having been made in payment of taxes, the property was advertised for sale, and a sale was made, at which the plaintiff in error became the purchaser, and received therefor a certificate of sale. That the Commissioners under the act after the expiration of sixty days from the time fixed by them for receiving the taxes pursuant to a general rule adopted by them, refused to receive the taxes unless tendered by the owner in person, and further, that "whilst the said premises however were advertised the brother-in-law of the former owner went to the office of the Commissioners to see after the payment of the tax on the property but made no formal offer or tender of payment because such offer or tender was in effect waived by said Commissioners, they declining to recognize any tender unless made by the owner in proper person." See pages 13, 14, and 15 — Judgment was thereupon rendered for the defendants in error.

II.

The act referred to, after providing how the assessment shall be made, declares that the land shall be charged with the payment of the tax, which, together with a penalty provided shall be a lien thereon. That within sixty days after the Commissioners have fixed

the amount the owner may pay such tax either into the treasury, or to the Commissioners, and take a certificate thereof by which the lands will become discharged of the lien of the tax and penalty. If not paid within that time the land became forfeited and liable to be sold for default of payment. By the seventh section as amended in 1863, the Commissioners are authorized to sell such lands. "In all cases where the owner of said lots or parcels of ground shall not on or before the day of sale appear in person before the said board of Commissioners, and pay the amount of said tax with ten per centum interest thereon with the cost of advertising, &c. The purchaser is "Entitled to receive from said Commissioners their certificate of sale; which said certificate shall be received in all courts and places as prima facie evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same." It is further provided "That the certificate of said Commissioners shall only be effected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act."

III.

The construction of some of these provisions came before the court in Bennett vs. Hunter, 9 Wallace 326.

In that case as stated in theopinion, "After advertisement, but before the sale, the amount of the tax, expenses, penalties, and costs, was tendered to the Commissioners appointed for the collection of taxes, under the act, who refused to receive the money upon the ground that the tender was not made by the owner of the land in person." It was held that by the forfeiture declared, the title did not pass, but remained in the owner until the sale, that thereby the title only became subject to be vested in the purchaser at the sale, and that before such sale the right of payment was not limited by the act to the actual owner in his proper person. The Court therefore say: "The sum due the United States for taxes, penalty, and courts, was tendered to the Commissioners before sale, and it was their duty to accept it. The tender was not objected to as insufficient, but was refused solely because not made by the owner in person. This refusal not being warranted by the act, the tender must be held good. The certificate of sale under which the plaintiff in error claims title cannot be sustained. The sale must be regarded in law as having been made after payment of the tax, and as insufficient to vest the title to the land in the purchaser." The cases argued with it. and decided at the same time, were held not distinguishable in principle. The principle is, that there was a tender of taxes before the sale

that such tender made by any party other than the owner could be accepted and relied upon by such owner, and that there was such a tender in all the cases then decided, or what was equivalent to it.

It will be observed that in this case the *sufficiency* of the tender was not a question decided upon by the court, but it was assumed that there was an actual tender before the sale. The law declaring what shall be the effect of the certificate of sale was upheld by declaring that such tender was equivalent to *payment* before the sale.

IV

In the case at bar it is claimed that there was no such tender, and that it is distinguishable from the case of Bennett vs Hunter upon this ground. The fair construction of the finding of the court is, that the brother-in-law went only to *see after* the payment of the tax. The Commissioners informed him that they could not recognize any tender or payment except by the owner in person, *thereby* waiving any offer or tender. The waiver relied upon is defined, being simply, declining to recognize a tender unless by the owner in person. Regarding this as a sufficient excuse the person makes no formal offer or tender.

It does not appear that he went *prepared* to pay the tax; that he proposed to pay it; that he was willing or able to pay it. On the contrary what he went there for is expressed, "to see after the payment of the tax." That is all as the finding declares. It cannot be urged that there was an actual tender, for it is expressly said that there was not. For the purposes of this case it must be considered that he was *not* ready, able, prepared, or willing to pay the tax. To have the benefit of a tender the party must be *prepared* at least

"Either there must be an actual offer of the money or the party must be ready to pay it at the time when the actual offer of it is dispensed with." Thomas vs. Evans, 10 East 101. The actual production of the money is not necessary if the debtor *having it ready to produce and offering to pay it* the creditor dispense with the production at the time. Id.

"Where there is a dispute as to the amount of the demand the party by objecting to the quantum might dispense with the tender of the actual or of any specific sum; there should be however an offer to pay, by producing the money, unless the party dispensed with the tender expressly, by saying, that the defendant need not produce the money as he would not accept it; for though he might refuse the money at first if the saw it produced he might be induced to accept it," 4 Esp. 68. The principle of all the cases is that a mere refusal upon a wrong ground will not be a sufficient excuse for the non production of the money and an actual tender unless the party desiring the benefit of a tender is *pre-*

pared to make it. He must show himself altogether right on his part. To hold otherwise would reverse all the principles of tender as uniformly held by the courts. See also 5 Esp. 48; 15 Wend. 637; 6 Pick. 356: 2 Greenleaf's ev. Sec. 600, and cases there cited. The question here is not can the party rely upon a tender which is his own act but can he rely upon an excuse for not making a tender by reason of the act of the Commissioners, when in fact he was not prepared to make the tender even if it would have been accepted.

In Blight vs. Ashley, 1 Peters C. C. Rep. it is said: "After an offer of performance, and a refusal of acceptance, it is not in the power of the opposite party to say that he who made the offer would not or could not have done what he declared himself ready to do." But in this case there was no *offer of performance nor did the party declare himself ready to do* what was required. Just what he did do is expressly found and "*expressio unius exclusio alteriorum.*"

In Bennett vs. Hunter, an actual tender was held equivalent to payment. It was neccessary to so hold in order to avoid the effect of the certificate of sale. But to hold, that an excuse for not making a tender, especially when such excuse is not a good one, is equivalent to payment, is going much farther than that case, and much farther than the law allows.

V

The person who went to see the Commissioners only went to see after the payment of the *tax*, but there was then due *interest, penalty, and costs.* He did not go to see about these, but these were as much required to be paid as the tax. He had no idea of payment of anything but payment of the *tax.* The Commissioners could not have waived the tender of these for they were not the subject of the interview. The finding cannot be helped by a liberal interpretation. It should be construed with the same strictness as a special verdict or a pleading. A person pleading a tender must state that he tendered the full amount, even to the last cent. The finding of the court is that upon which the defendants in error rely, and it may well be assumed that they procured as full a statement as they could get from the court, and that what is stated is all that the court would state.

VI

There is no reason why the law should be more liberally construed in this case than in the case of one seeking to redeem after the sale. The law is liberally construed in favor of one who seeks to redeem. Yet it is held that he must conform strictly to the requirements of the law.

If he seeks to redeem he must pay, or offer to pay, every cent required.

"The owner at his peril must pay to the officer the full amount necessary to redeem the estate, and it is important to look carefully into the law and the facts in order to ascertain the precise sum due. The costs, interests, penalty, and back taxes, can be readily ascertained by comparison of the law and facts. The parties in interest cannot be too circumspect in their examination with a view to ascertain the amount of the redemption money. The maxim *de minimis* etc. possesses no healing virtues in case the owner makes a blunder in this respect. The maxim as has been shown is seldom applied in favor of the purchaser, and it is presumed to be equally *inapplicable* against him. The condition imposed upon the former owner is usually plain and easily understood, and it is his duty to comply with its exact terms."

Blackwell on Tax-titles, 2nd Ed., p. 433, &c. "Loose declarations of parties will not be admitted in questions of this character. Id. 435.

VII

If the facts set forth in the finding of the court in this case are held to constitute a tender equivalent to payment, it will be impossible to sustained a tax title in scarcely any case. Since the decision of the case of Bennett vs. Hunter, which was contrary to the construction put upon the law by the Commissioners, and by the Treasury Department, efforts are being made to find some person, who perhaps without any intention to pay, made inquiries of the Commissioners, and from such and an equally casual remark of some one of the Commissioners, endeavor to make out a tender, or what is equivalent to a waiver of a tender. This case as shown by the evidence is a good illustration. A man apparently in liquor calls upon one of the Commissioners "to see after the payment." He is informed that payment can be made only by the owner. This is sought to be made the foundation of an equivalent to payment. The title to real estate evidenced by a certificate of the officers of the United States, intended by Congress to be of the strongest character, costing several thousand dollars invested upon the faith of the Government, is assailed by the uncertain breath of an intoxicated man, and upon this this court is asked to adjudge that said title must fall.

VIII.

The waiver of the tender insisted upon is to be considered in another aspect. The reason why a waiver of an act is an estoppel to the party making such waiver is not applicable here. The reason that a

waiver of some act constituting a tender has been in some cases claimed equivalent to a tender, is, that the party is estopped by his own act from setting up the want of the act constituting the tender.

In other words no one can insist upon that which he has once waived. And this binds him, and those claiming through him, and those for whom he has authority to act. But the Commissioners are no parties to this suit or interested in it. They were in no sense the agents of the plaintiff in error nor authorized to act for them, nor are they the vendors or grantors of the property. They were mere officers of the United States, and were mere instruments in performing the acts which results in a transfer of the title. The certificate of sale was not a grant or conveyance, nor does it purport so to be, nor does the law contemplate it as such. It is a mere certificate that the property at the sale was struck off to the purchaser and an acknowledgement of the receipt of the money. Nor does the title pass from the United States of whom the Commissioners were the officers. In Bennett vs. Hunter, it was held that the title remained in the former owner until the sale. It is then by operation of law transfered to the purchaser. In no sense then is this purchaser affected by an illegal act of the Commissioners. He is not estopped by any alleged waiver made by them. He has the right to insist that the party seeking to set aside his prima facie title should show that he has done all on his part that the law requires to effect such object, and no waiver of the Commisssioners can estop him from claiming this right.

IX

It was insisted in the court below that the adoption of the general rule by the Commissioners not to receive taxes except from the owner in person after the expiration of the sixty days *of itself* was such an irregularity as to avoid the sale.

It would seem hardly neccessary to discuss this question as the case now stands as in the case as shown by the finding there was a special application of the rule. The person acting for the owner was informed of it and if it be held that the sale should be set aside it must be because he acted in consequence of the application of the rule to this case. But to hold that the rule *of itself* was a fatal irregularity is going further, than is necesary to support the judgment of the Circuit Court. It would be deciding a principle not neccessary to be decided and would at once result in destroying the title to every piece of property sold by the Commissioners. It is not supposed that the court would do this if not neccessary to properly decide this case.

It may be said however that a general rule of action *of itself* works

no injury to an individual. It is the application of the rule to the individual case that does the harm. *Non constat* that such a rule was the reason of no offer or tender by any other person. Were there no such rule, it does not follow that any person would be prepared or able or willing to pay the tax. If not the owner has certainly received no harm by reason of such a rule. He could not say that the rule prevented the payment of his taxes by any other person, or that it was a waiver of such payment, or tender by them. There can be no waiver of an act of some other person when there is no such person. The mere existence of the rule, therefore, is not neccessarily the cause of non payment of taxes, and therefore, could not operate as a waiver in any particular case.

It was argued however that the existence of such a general rule operated to deprive the owner of the full opportunity to make payment permitted by law, and that thereby his rights in this respect were abridged by the Commissioners. This could not reasonably be urged when there is no intention or purpose to pay either by the owner or any one for him. But even if it were so, and even if it were an irregularity, it is not such an one as will be permitted to defeat the title evidenced by the certificate of sale. It was argued that to abridge the rights of the owner in this respect would be similar to abridging his rights in respect to the sixty days allowed for payment. Concede this to be so, and it would still not be a fatal irregularity. Such an irregularity could not be set up against the certificate of sale which by the law is to be affected as evidence of regularity and validity only by showing that the land was not subject to taxes, or that the taxes were paid, or that the land has been redeemed.

The question as to the effect of such a certificate and the power of a legislative body to give it conclusive effect has been considered by the courts. In McReady vs Sexton 29 Iowa, 356, it has been elaborately discussed. It is there held that such a certificate will estop its assailant from showing the want of everything except what are called *jurisdictional* requirements These are said to be four, to wit: Listing and assessing the property, the levy of the tax, the tax warrent, and the sale. "These are *essential* and *jurisdictional* and every other provision of every revenue law may safely be said to be directory only." The owner cannot be estopped from showing the want of such *jurisdictional* facts by a certificate of sale, but he may be as to such facts as are merely directory.

"To restate the proposition succinctly whatever the legislature is at liberty to authorize or not it may waive or estop denial, but not so as to that which it must require."

Now Congress had *power* to provide that no one except the owner in

proper person after default by him should be permitted to redeem the land from such default, or to provide that there should be payment by no one, just as it had power to provide thirty instead of sixty days for payment. Having such *power* it would provide that if the Commissioners abridge the right of the owner in these respects the owner shall be estopped from setting up such an irregularity to defeat the title evidenced by the certificate of sale.

X.

There was no demand of payment necessary, nor other notice required than was given. An irregularity if any in these respects could not be urged against the certificate of sale.

See Turner vs Smith, 14 Wallace, 553.

The judgment of the Circuit Court should be reversed.

W. WILLOUGHBY,
Counsel, for Plff. in Error.
Alexandria, Va

Supreme Court of the United States.

JEFFERSON TACEY, PLAINTIFF IN ERROR,

vs.

MARY IRWIN, NANNIE P. IRWIN, RUTH IRWIN, GRACE IRWIN, REBECCA IRWIN, AND EDITH QUISENBERRY.

BRIEF OF S. FERGUSON BEACH,

FOR DEFENDANTS.

Judd & Detweiler, Printers.

Supreme Court of the United States.

JEFFERSON TACEY, PLAINTIFF IN ERROR,

vs.

MARY IRWIN, NANNIE P. IRWIN, RUTH IRWIN, GRACE IRWIN, REBECCA IRWIN, AND EDITH QUISENBERRY.

BRIEF FOR DEFENDANTS.

This was an action of ejectment to recover a house and lot in the city of Alexandria, Virginia.

The defendant claimed title to the property under a purchase made by him in 1864, at a sale of land for unpaid taxes made by the direct tax commissioners for the State of Virginia, under the act of Congress, approved June 7, 1862, entitled, "An act for the collection of the direct tax in insurrectionary districts within the United States, and for other purposes."

12 Stat. at Large, 422.

The construction of this act, and the validity of sales under it, have been several times before this court.

In the present case the facts were found specially by the court, and the finding was as follows—(see transcript, p. 13.)

Finding of the Court.

And, now, at this day, to wit, on Thursday, November 23d, 1871, the issues of fact in this cause having been tried

and determined by the court without the intervention of a jury, pursuant to stipulation in writing, duly signed and filed, the court doth make the following finding upon the facts: Prior to and at the time of the sale by the United States direct tax commissioners hereinafter mentioned, Turner Dixon, of the city of Alexandria, Virginia, was seized and possessed in fee of the premises in the declaration mentioned.

On the day of , 1864, Turner Dixon died, having first published a valid will and testament, by which he devised the said premises to the said Mary J. Dixon.

On the day of , 1871, said Mary J. Dixon died, having first published a valid will and testament, by which she devised the said premises to Mary Irwin and the others in whose names, as plaintiffs, this cause stands revived.

On the 29th day of January, 1864, the said premises were sold by the United States direct tax commissioners for Virginia, appointed under the act of Congress, approved June 7th, 1862, entitled, "An act for the collection of the direct tax in insurrectionary districts within the United States, and for other purposes." The said property was sold by said commissioners as land liable to be sold under the provisions of the 7th section of said act, because the direct tax imposed upon said property by the act of August 5, 1861, imposing a direct tax, had not been paid.

The property was purchased at said sale by J. Tacey, the defendant, who received from said commissioners a certificate of sale, in the words and figures following:

CERTIFICATE OF SALE.

No. 111.

UNITED STATES OF AMERICA, *Tax Sale Certificate No.* 33.

This is to certify that at a sale of land for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," held, pursuant to notice, at Alexandria, in the county of Alexandria, in the State of Virginia, on the 29th day of January, A. D. 1864, the tract or parcel of land hereinafter described, situate in the city and county of Alexandria, and State aforesaid, and

described, as follows, to wit: House on King street, between Washington and Columbus, said to have belonged to Turner Dixon, and charged to him on the land-book of the State aforesaid for the year 1860; and further described as being No. 171 King street, (lot fronting on King about 23 feet, and running 52 feet to a three-feet alley, be the same, more or less,) was sold and struck off to Jeff. Tacey for the sum of two thousand five hundred and seventy-five dollars and —— cents, he being the highest bidder, and that being the highest sum bidden for the same, the receipt of which said sum, in full, is hereby acknowledged and confessed.

Given under our hands, at Alexandria, this 29th day of January A. D. 1864.

JOHN HAWXHURST,
GILLET F. WATSON,
A. LAWRENCE FOSTER,
Commissioners.

Under and by virtue of said certificate of sale, the said defendant entered upon and now holds the said property.

The said tax commissioners entered upon the discharge of their duties, in the city and county of Alexandria, Virginia, in the month of June, 1863, and on the 11th of September, 1863, they fixed the amount of the said direct tax, chargeable respectively upon the several lots and parcels of ground, in said city and county, including the property in controversy in this cause.

On the 11th of September, 1863, they caused to be inserted in a newspaper, published daily in Alexandria, Virginia, the following notice:

Notice to Owners of Real Estate.

The undersigned, commissioners, hereby give notice that they will be ready, at their office, corner of Washington and Prince streets, Alexandria, on and after the 14th of September next, to receive the direct tax assessed and fixed by them on the lots and tracts of land in the city and county of Alexandria, under and by virtue of an act of Congress entitled "An act for the collection of direct taxes in insur-

rectionary districts within the United States, and for other purposes."

Office hours, from 8¾ o'clock a. m. to 2¾ p. m.

JOHN HAWXHURST,
W. J. BOREMAN,
G. F. WATSON,
Commissioners.

The said commissioners in performing their duties under the said act of June 7, 1862, did not at any time, or in any case, make, or cause to be made, any demand for the payment of the tax, either upon the owner or occupant of the property, respectively, liable therefor, or upon any person whatever, and they made no effort, in any case, of any kind whatever, to collect said tax before proceeding to a sale of the land, except the publication of the said notice of September 11th.

On the expiration of sixty days, from the 14th of September, 1863, the said commissioners treated all of said property in said city and county, on which the tax then remained unpaid, as forfeited to the United States, and liable to sale under said 7th section of said act of June 7, 1862, and they proceeded, from time to time, to advertise the same for sale accordingly.

Pending the advertisement of the property for sale under said 7th section, said commissioners, pursuant to a general rule adopted by them to that effect, invariably refused, in all cases, to receive the tax upon property so advertised, unless tendered by the owner in his own proper person; and, notwithstanding the ~~payment~~ tender of the tax by any agent, relative, or friend of the owner, the commissioners nevertheless treated and sold the property as delinquent.

This rule and practice was established and followed by them pursuant to instructions from some officer of the Treasury Department. Applications were made to said commissioners by the agents and friends of absent owners to pay the tax upon advertised property and save it from sale; which applications, under the operation of said rule and practice, were uniformly refused by the commissioners. No note, record, or memorandum of such applications, was kept or made by the commissioners, though such applications were frequent. The premises in the declaration mentioned were sold as aforesaid by the commissioners without

the knowledge or consent of the said Dixon, he being absent from Alexandria, and within the Confederate military lines, from the ——— day ———, 1861, continuously to the day of his death. Whilst the said premises, however, were advertised for sale, his brother-in-law went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer or tender of payment, because such offer or tender was, in effect, waived by said commissioners, they declining to recognize any tender unless made by the owner in proper person.

Judgment.

Wherefore it is considered by the court that the plaintiffs do recover of the defendant the premises in the declaration mentioned according to the finding of the court, and that they recover also their costs by them about their suit in this behalf expended.

HUGH L. BOND, *Judge, &c.*

NOVEMBER 23, 1871.

The general question presented on the facts found as above, is, was the tax sale a valid one? We say not.

1. An offer to pay the tax before sale, and refused by the commissioners because not made by the owner in person, renders a subsequent sale by the commissioners void.

Bennett *vs.* Hunter, 9 Wal.

If the tax, though not actually offered, would have been offered and paid before sale, but for the known refusal of the commissioners to accept any offer when not made by the owner in person, then the sale by the commissioners was void.

In the case of Martin *vs.* Beverly & Snowden, argued and decided at the same time, (but not reported,) with Bennett *vs.* Hunter, and which the Supreme Court, in its opinion, stated was not distinguishable in principle from the latter, the statement of the record on this point was, (see p. 15 of that transcript,) that a "friend of the owner went to the office of

the commissioners prepared to pay the tax, but made no tender of it, being informed that the tax would not be received, except from the owner in person."

In the present case, (see last paragraph of finding,) the "brother-in- law of the owner went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer or tender of payment, because such offer or tender was in effect waived by said commissioners, they declining to recognize any tender unless made by the owner in proper person."

2. It is specially found that "pending the advertisement of property for sale under said 7th section, said commissioners, pursuant to a general rule adopted by them to that effect, invariably refused, in all cases, to receive the tax upon property so advertised, unless tendered by the owner in his own proper person, and notwithstanding the tender of the tax by any agent, relative, or friend of the owner, the commissioners nevertheless treated and sold the property as delinquent. This rule and practice was established and followed by them pursuant to instructions from some officer of the Treasury Department.

"Applications were made to said commissioners by the agents and friends of absent owners to pay the tax upon advertised property, and save it from sale, which applications, under the operation of said rule and practice, were uniformly refused by the commissioners. No note, record, or memorandum of such applications was kept or made by the commissioners, though such applications were frequent."

We maintain that the rule and practice established by the commissioners, found as above, of itself nullified all sales made by them. Having shown the existence of such a rule and practice, it is not necessary that one contesting the validity of a tax sale should show any fact beyond this.

By the terms of the act of June 7, 1862, (12 Statutes, 422,) an opportunity of paying the tax is provided for the property owner, before his property becomes liable to sale.

A period of sixty days, from the time of fixing the tax, is given him before his property is even liable to be *advertised* for sale; and, after advertisement, the act still gives him the opportunity to pay and save his property at any time before sale is actually made.

Bennet *vs.* Hunter, 9 Wal., 337.

The opportunity to pay, provided by the act, was the right to pay at any time, and by the hands of any person whatever, from the day of the fixing of the amount of tax down to the moment of sale. About this there is no dispute.

9 Wal., 337, 338.

Now, the foundation of every valid sale for non-payment of taxes, is the *default* of the owner: if there be *no* default on the part of the owner, his property cannot be sold rightfully.

But there *can be* no default on the part of the owner, unless the opportunity of payment allowed by law has been first accorded to him, and he has, *notwithstanding*, suffered the tax to go unpaid.

Suppose the commissioners under the act, without waiting through the period of sixty days, had advertised and sold at the end of thirty days; such a sale would have been void—confessedly so, I assume, because the opportunity allowed by law to the owner for payment would not have been accorded to him. No default could be imputable to him until this opportunity had been first fully enjoyed by him, and had been suffered to pass unimproved; and, there being no default, there could be nothing to give authority for sale.

It is a proposition not requiring argument, that a denial, to the owner of property, of this opportunity of payment, *in toto*, would invalidate any subsequent sale of the property for supposed default; as for example, if the commissioners, on the very day of fixing the amount of the tax, should at once advertise and sell the property, because of the non-payment of the tax, waiting not at all for its payment.

I submit this as one the of axioms of this case.

Assuming this proposition to be sound, I submit as a further proposition, that this opportunity of payment is a privilege in its nature, entire—not divisible—not susceptible of being enjoyed in part, and denied in part, but of such a nature that a denial of it in part is equivalent, *ex necessitate rei*, to a denial of it altogether.

I have supposed the commissioners to advertise and sell at the end of thirty days, instead of waiting till the end of sixty, and have assumed that such a sale would be confessedly void. Would not the result be the same, if they advertised and sold at the end of forty days, or at the end of fifty days, or at the end of fifty-nine days? The same undeniably.

The man who pays his tax on the sixtieth day, satisfies both the letter and spirit of the law, as completely as the man who pays on the first day. The denial of one day out of the sixty can no more be allowed than the denial of two, or of three, or of ten, or of fifty-nine. For if *one* may be denied without invalidating a sale where are we to stop? Obviously we cannot stop anywhere short of allowing that the whole sixty may be denied, and yet a sale be good. But this is contrary to my axiom. A denial of the whole sixty would invalidate a sale, so then, must the denial of one day, and hence it follows, that a denial of one day is equivalent to a denial of the whole sixty—a result which can only comes from conceding that this opportunity of payment *is a privilege in its nature entire and indivisible*—Q. E. D.

If this opportunity of payment be a privilege in its nature entire, it must and will be admitted, that when we show a denial of it in any part, the same consequences follow, as when we show a denial of it out and out, altogether; this, necessarily and inevitably, results from its *entire* character. It is so of everything which is entire—as an entire condition—an entire contract, &c.

An entire condition, unperformed in part, is unperformed

altogether; so of an entire contract. And this is not a legal fiction, but a legal and practical reality, because the part unperformed may be that which gives value to the whole, as here, that part of the privilege denied, may be the very part required for satisfying the requirement of the law.

Did this rule and practice established by the commissioners operate as a denial, in any part, of the opportunity of payment provided by law?

This opportunity of payment, as before stated, consisted in the right to pay within a given period of time, and also in the right to pay by the hand of any person whatever: this is agreed.

Now, there may be a denial of this opportunity, as well by unlawfully restricting the *manner* of payment, as by unlawfully restricting the *time* of payment.

If the commissioners were to adopt and enforce a rule by which no tax was to be received after the expiration of *thirty* instead of sixty days from the time of fixing it, a sale of land as delinquent, under the operation of that rule and practice, would be void, on the foregoing reasoning; there would have been a denial of half the period given by law for the payment.

If the commissioners were to adopt and enforce a rule by which no tax was to be received unless tendered by a person of a particular age, or of a particular color, or by the owner in person, when the opportunity provided by law is the privilege of paying by the hand of any person whatever, without regard to age, or color, or ownership, here would be a denial of the opportunity of payment as clear and palpable and substantial as where it consists in denying some portion of the *time* allowed by the law.

The opportunity provided by law is a privilege of paying in any manner whatsoever. The opportunity as accorded by the commissioners is the privilege of paying in one particular and specified manner only.

A denial of one of several *modes* of payment cannot be

distinguished, in principle, from a denial of one of several *days* of payment. A denial of every *mode* but one cannot be distinguished from a denial of every *day* but one. A denial of one day is equivalent to a denial of the whole sixty, and will avoid a sale, and so a denial of one method is equivalent to a denial of all methods, and will likewise avoid a sale. And note that here there was a denial of every method but one.

The commissioners, as appears by the finding, in administering the act of June 7, 1862, adopted, in advance, and enforced it as an inflexible rule not to accept the tax on property whilst advertised for sale under the 7th section, *unless tendered by the owner in his own proper person.* If tendered by his wife, or his friend, or his agent, or by a stranger, under the established rule, it could not be received; the property must be, and was, treated as delinquent, and was sold accordingly.

Here was a denial to all owners of property, in a very important and substantial particular, of the opportunity provided by law for the payment of the tax; this, surely, will not be disputed.

But this opportunity of payment being a privilege in its nature entire, a denial of it in any part, as we have seen, is a denial of it altogether, and thus we are brought back to the question, can any sale for non-payment of taxes be valid where the opportunity of payment allowed by law has been wholly denied to the owner?

I have already submitted, and again submit, that the negative answer to this question must be granted as an axiom in this case.

The reason on which the law holds that a privilege, or a contract, or a condition in its nature entire, cannot fail in part and avail in part, but, if failing in any part, must be treated as having failed altogether, has been already adverted to. It is, that the part in which it fails, may be the very

part required to make the privilege of any value, or to give any value to performance.

The justice of this principle, and the force of the reason on which it is founded, were never more apparent than in this case.

The tax commissioners having entered upon the discharge of their duties in Alexandria, in June, 1863, fixed the amount of tax upon the several pieces of property in the city and county on the 14th of September following; the period of sixty days commenced to run on that day, (September 14, 1863,) and it commenced, continued, and expired, without any notice being given by the commissioners, actual or constructive, * that any tax at all was payable. The act itself, under which the commissioners were appointed, gave no information whatever upon the subject.

The commissioners sat passively in their office during the whole period, neither going out themselves, nor sending out, to leave any notice of the tax, or to make any demand for the tax, either upon the premises respectively liable for it, or in any place, or upon any person.

The sixty days passed, and immediately thereupon the commissioners proceeded to advertise for sale, as forfeited for the non-payment of the tax, all the property on which the tax had not been paid.

Thus the first information of an official character given to the public in regard to this tax, was that the property subject to it had become forfeited and liable to sale, and was to be sold, because the tax had not been paid; and when the agents, relatives, and friends of absent owners crowded forward to pay the tax and save the property from sale, they were told by the commissioners that the tax could not be received from them, that the owner must himself come in his own

* The short advertisement of September 11 was not even constructive notice, being unauthorized by law. It was, at most, a mere act *in pais*, and, at that gave no intelligible information even to such as may have seen it.

person to their office and pay it with his own hand; that no other mode of payment was allowed or allowable.

Such are the facts of the case, and being such, must it not be granted that this denial of the privilege of payment, except it should be made in one particular manner, was *practically*, as well as in law, a denial of it altogether? The mode of payment required by the commissioners was just the very mode which it was impossible to adopt, and was exactly equivalent to an absolute denial altogether of the privilege of making payment.

But, it may be suggested, it is not enough to invalidate a sale to show that there was this general denial of the privilege of payment; you must show that, nowithstanding this denial, you actually made an attempt to pay, and that your attempt failed because of the rule established by the commissioners, for *non constat*, that this rule and practice, so established, prevented the payment; the failure to pay *may* have resulted from inability or unwillingness to pay, and the tax *might* not have been paid even though there had been no denial by the commissioners.

This suggestion is not sound. Suppose again the case—say of a sale made at the expiration of thirty days instead of sixty. Such a sale would be held void upon the simple proof that we were denied half the time allowed by law for payment. Proof of that alone would be sufficient; yet, in this supposed case, it might be suggested with like truth and force, as in the case under consideration, that the failure to pay the tax *might* not, in fact, have resulted from the want of the time within which to pay it; it *might* have resulted from inability or unwillingness to pay, and we might, in such a case, with equal propriety and reason, be required to prove that, had the full time been allowed, the tax would *then* have been paid.

The true principle is this: as the law does not require impossibilities, so it does not require an *attempt* at impos[illegible]ed bilities. [illegible]*the* [illegible]not

When, in the present case, we show that the unlawful action of the commissioners rendered it impossible to pay the tax in the manner allowed by law, we are not compelled to show further an attempt, notwithstanding, to perform the impossibility. We cannot be subjected to the double requirement of showing, first, the impossibility of payment, and second, that but for the impossibility payment would have been made.

"Any one bound to do a particular thing must either do it, or offer to do it, and if no objections are made, he must show he made the tender in a regular manner; but this is not necessary, if the other party by his conduct dispenses with a regular tender, as by a previous refusal to accept it, &c. After an offer of performance and a refusal of acceptance, it is not in the power of the opposite party to say that he who made the offer would not, or could not, have done what he declared himself ready to do."

Blight *vs.* Ashley *et al.*, 1 Peters C. C. R., 15.

"But where one party has incapacitated himself to perform his part of the contract, there is no need of the other coming forward at the time to make a tender, *or to show himself in a capacity to pay*, because it would be a nugatory act, which the law will never require If the one party discharges the other from a performance by saying he will not perform on his part, (and voluntarily and tortuously rendering himself unable to perform his part, is equivalent to such discharge,) it is well understood that it is not necessary for the other party to go forward," &c.

Cortilyon *vs.* Lansing, 2 Caine's Cases in Error.

Having shown a general and inflexible rule established by the commissioners, which was an absolute refusal in advance, in all cases, to allow payment of the tax in the only manner, which, under the circumstances, was possible, we cannot be held to show a special refusal in this special case; proof of a precedent general and unqualified refusal in all cases, is equivalent to proof of a special refusal in every special case.

Summing up in brief the argument on this point, I say,

person to their office and pay it with his own hand; that no other mode of payment was allowed or allowable.

Such are the facts of the case, and being such, must it not be granted that this denial of the privilege of payment, except it should be made in one particular manner, was *practically*, as well as in law, a denial of it altogether? The mode of payment required by the commissioners was just the very mode which it was impossible to adopt, and was exactly equivalent to an absolute denial altogether of the privilege of making payment.

But, it may be suggested, it is not enough to invalidate a sale to show that there was this general denial of the privilege of payment; you must show that, notwithstanding this denial, you actually made an attempt to pay, and that your attempt failed because of the rule established by the commissioners, for *non constat*, that this rule and practice, so established, prevented the payment; the failure to pay *may* have resulted from inability or unwillingness to pay, and the tax *might* not have been paid even though there had been no denial by the commissioners.

This suggestion is not sound. Suppose again the case—say of a sale made at the expiration of thirty days instead of sixty. Such a sale would be held void upon the simple proof that we were denied half the time allowed by law for payment. Proof of that alone would be sufficient; yet, in this supposed case, it might be suggested with like truth and force, as in the case under consideration, that the failure to pay the tax *might* not, in fact, have resulted from the want of the time within which to pay it; it *might* have resulted from inability or unwillingness to pay, and we might, in such a case, with equal propriety and reason, be required to prove that, had the full time been allowed, the tax would *then* have been paid.

The true principle is this: as the law does not require impossibilities, so it does not require an *attempt* at impossibilities.

When, in the present case, we show that the unlawful action of the commissioners rendered it impossible to pay the tax in the manner allowed by law, we are not compelled to show further an attempt, notwithstanding, to perform the impossibility. We cannot be subjected to the double requirement of showing, first, the impossibility of payment, and second, that but for the impossibility payment would have been made.

"Any one bound to do a particular thing must either do it, or offer to do it, and if no objections are made, he must show he made the tender in a regular manner; but this is not necessary, if the other party by his conduct dispenses with a regular tender, as by a previous refusal to accept it, &c. After an offer of performance and a refusal of acceptance, it is not in the power of the opposite party to say that he who made the offer would not, or could not, have done what he declared himself ready to do."

Blight *vs.* Ashley *et al.*, 1 Peters C. C. R., 15.

"But where one party has incapacitated himself to perform his part of the contract, there is no need of the other coming forward at the time to make a tender, *or to show himself in a capacity to pay*, because it would be a nugatory act, which the law will never require If the one party discharges the other from a performance by saying he will not perform on his part, (and voluntarily and tortuously rendering himself unable to perform his part, is equivalent to such discharge,) it is well understood that it is not necessary for the other party to go forward," &c.

Cortilyon *vs.* Lansing, 2 Caine's Cases in Error.

Having shown a general and inflexible rule established by the commissioners, which was an absolute refusal in advance, in all cases, to allow payment of the tax in the only manner, which, under the circumstances, was possible, we cannot be held to show a special refusal in this special case; proof of a precedent general and unqualified refusal in all cases, is equivalent to proof of a special refusal in every special case.

Summing up in brief the argument on this point, I say,

thta no valid sale of land for non-payment of the tax can be made under the act of June 7, 1862, unless and until the opportunity of payment, provided by the act, has first been accorded to the owner; that the *default* of the owner is the *foundation* of the authority to sell, and there *can* be no default on his part until he has been allowed the opportunity of payment provided for him; that this opportunity is a privilege in its nature entire, and not susceptible of division, so that a denial of it in any part is equivalent to a denial of it *in toto;* that the restriction upon the mode of payment, unlawfully imposed by the commissioners, *was* a denial of this privilege in a most essential part; that no default whatever can be predicated of the owner of the property, and that the sale, therefore, rests upon no foundation.

But, it may be argued, that the legal effect given by the act to the certificate of sale shuts out all inquiry as to their mode of executing the law.

The direct enacting clause, as to the force of the certificate, is, (see section 7) "which said certificate shall be reeeived in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and *of the title of the said purchaser or purchasers under the same.*"

This enactment simply shifts the burdens of proof, but does not in any degree dispense with that strictness in the execution of the power which has always been held necessary to a good title under a tax sale.

Any irregularity in the execution of the power has the same effect under this enactment that it always had—proof of it is cast on him who contests the tax title—that is all. Proof of the absence of an authority to sell will destroy the tax title, notwithstanding *this* enactment.

But the direct enactment, respecting the force of the certificate as evidence, is qualified by a proviso, the last proviso in section 7, "that the certificate * * * shall only be affected as evidence of the regularity and validity of the sale by establishing the fact that said property was not subject

to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed," &c.

(The province of a proviso to a statute is not to enlarge the enacting clause; it can only restrain, qualify, or explain it. 1 Scammon 259, 4 Scammon 352, 19 Ver. 129.)

The plaintiff in error may claim that this proviso makes the certificate conclusive evidence of a perfect title, except against proof that the land was not subject to taxes, or that the taxes had been paid, or that the land had been redeemed.

In the absence of any enactment specially on the point, two things are necessary to make the title acquired at a tax sale good, viz: 1st. The commissioners must have authority to sell; and 2d. The sale must be conducted strictly according to the mode prescribed.

On the claim of the plaintiff in error as to the effect of this proviso, it would result, that however unauthorized, for other causes, the action of the commissioners might be in making a sale, the owner would be prevented from showing this absence of authority, unless it grew out of the fact, that the land was not subject to taxes, or that the taxes had been paid. The commissioners might lack authority to sell for other than these two reasons. If they were to sell at the expiration of ten days, instead of waiting for the expiration of the sixty—that would clearly be a sale without authority. Yet the title acquired at it would, nevertheless, be good, under the certificate, if the certificate has the effect claimed, and thus a sale by a public officer, having no authority to sell, would carry a perfect title.

Such legislation, in the language of Judge Caton, (Curry *vs.* Hinman, cited in Blackwell, 81,) would be "nothing less than a moral fraud"—"the monstrous injustice of such a law is too glaring to admit of that construction, if one more just and reasonable can be given to it."

That the statute might provide, that an irregularity in the mode of conducting the sale should not vitiate the title, may be very readily admitted—but that the statute should further

provide, that the absence of authority to sell should not vitiate it, is simply monstrous.

See Blackwell, p. 79 *et seq.* Chap. "*Of the onus probandi*," for collection of decisions on statutes giving certain conclusive effects to tax deeds, &c.; also, Abbot *vs.* Lindenbower, 42 Mo., 162.

These decisions clearly indicate the opinions of the several courts by which they are made, that any attempt to make the tax deed conclusive evidence of the *authority to sell* would be vain.

These decisions also show that courts will construe a statute as not intended to have such effect, if such construction can be given to it.

Thus, where it had been enacted that a tax deed should be conclusive evidence of the "*regularity and legality of the sale*" it was held, (Garrett *vs.* Wiggins, 1 Scammon,) that this had reference to the mode of conducting, and not to the authority to make the sale.

A "regular and legal" sale under a tax law does not therefore necessarily import a good title, according to the spirit of these decisions—because a "regular and legal" sale does not necessarily imply an authority to sell—and without that a "regular and legal" sale carries no title.

In the light of these decisions I ask special attention to the phraseology employed in this act of June 7, 1862.

The direct enactment declares, that the certificate shall be *prima facie* evidence of the "regularity and validity of the sale and *of the title of the purchaser*." The proviso speaks of the certificate as evidence of the "regularity and validity of the sale," omitting the words "*and of the title of the purchaser*."

The employment of these last words in the direct enactment, and their omission in the proviso, is not an immaterial circumstance.

If "regularity and validity" in the sale necessarily implied a perfect title in the purchaser, then the words "*and of the title of the purchaser*," were pure tautology. But this is not

to be presumed under any circumstances, and especially not where such a presumption would make a proviso productive of the consequences above stated.

Here, then, it is implied that there may be "regularity and validity" of sale, and yet not a title in the purchaser; and this can only be explained by construing the expression "regularity and validity" to have reference to the mode of conducting the sale—that it does not include the authority to sell, which is also requisite to a perfect title. Thus the effect of the proviso is not to shut out proof of the absence of authority, from whatever circumstance such want of authority may result, but only to exclude evidence of irregularity in conducting the sale.

If the position of the plaintiff in error be a true one, then the commissioners might fill up and sign a certificate of sale, and without advertising a sale, or without having a sale, or without even laying the tax, by the mere issue of this certificate might strip a man of his property forever.

But all difficulty, if any, arising under this proviso, is removed by the joint resolution of February 25, 1867, (XIV Stat. at Large, 568, section 6,) repealing certain previous amendments of the direct tax law, and declaring that "certificates of sale shall be received in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and of the title of purchaser or purchasers under the same, as provided in section 7 of the act * * * approved June 7, 1862."

This declaration, as to the legal effect of the certificate, operates to repeal all previous inconsistent declarations on that subject, and thus repeals the proviso* now under consideration.

S. FERGUSON BEACH, *For Defendants.*

---

* NOTE.—The act of June 7, 1862, with its amendments, was before the United States circuit court for the eastern district of Arkansas, in case of Washington L. Schenck *vs.* Gordon N. Peay *et al.* An abstract of the points decided is reported in "Internal Revenue Record, August 14th, 1869, vol. x, p. 54."